

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JAN 29 2009

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0272-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
RICHARD CORRALES RIVERA,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053818

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

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Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Barton & Storts, P.C.  
By Brick P. Storts, III

Tucson  
Attorneys for Petitioner

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PELANDER, Chief Judge.

¶1 Following a jury trial, petitioner Richard Rivera was convicted of aggravated driving under the influence of an intoxicant (DUI) while his driver's license was suspended,

revoked, or restricted and aggravated driving with an alcohol concentration of .08 or more while his license was suspended, revoked, or restricted. The trial court sentenced him to concurrent, “partially substantially” mitigated, seven-year prison terms. After counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), we affirmed the convictions and sentences imposed. *State v. Rivera*, No. 2 CA-CR 2007-0101 (memorandum decision filed Feb. 27, 2008). Rivera filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging that trial counsel had rendered ineffective assistance at the prior convictions trial. In this petition for review, Rivera challenges the trial court’s order summarily dismissing his petition and denying his motion for rehearing. Rivera argues that he is entitled to be resentenced as if he had had no prior convictions or, at a minimum, to an evidentiary hearing. We will not disturb a trial court’s denial of post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 To state a colorable claim of ineffective assistance of counsel, a defendant must establish both that counsel’s performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To show he was entitled to an evidentiary hearing, Rivera was required to establish a colorable claim for relief, that is, a claim which, if true, might have changed the outcome below. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *Watton*, 164 Ariz. at 328, 793 P.2d at 85.

¶3 Following the jury trial on the charged offenses, the court set a bench trial on the state's allegations of prior felony convictions. At that proceeding, Rivera agreed to admit he had two prior felony convictions, one for aggravated DUI and the other for criminal damage, in exchange for the state's dismissing allegations of three other prior convictions and commission of the instant offenses while on release and its agreement not to seek a sentence greater than ten years. When Rivera failed to respond to the court's initial question whether he wanted to admit the prior convictions or have a trial, the court ordered the parties to proceed with the priors trial. The prosecutor then asked for a one-week continuance, explaining that, although her witnesses were present, the original fingerprint card for the DUI conviction had mistakenly been sent to her office and she had brought only a copy of the card to court. The court denied her request.

¶4 Following a recess, defense counsel advised the trial court Rivera had decided to admit two of the prior convictions. The court thoroughly explained to Rivera the consequences of his admissions and elaborated even further after Rivera told the court he had "a hard time understanding" what the court was explaining to him. Although Rivera stated he understood the proceedings and the consequences of his admissions, he pointed out that the prior DUI conviction had not taken place in Santa Cruz County, as the state had alleged. Without objection from defense counsel, the court permitted the state to amend its allegation to reflect that the conviction had occurred in Pima County, and Rivera then admitted that conviction. When the court asked Rivera if he admitted having a prior felony conviction for criminal damage in Santa Cruz County, Rivera stated he believed that

conviction was a misdemeanor. Defense counsel then explained, “[i]n all candor,” that he had gone to Santa Cruz County to check the file and had discovered that the Santa Cruz County Superior Court had designated the previously open-ended offense as a felony. Counsel presented the trial court with documents supporting that fact, and Rivera then admitted that prior conviction.

¶5 The trial court dismissed Rivera’s Rule 32 petition, finding he had failed to demonstrate that counsel’s conduct had caused him any prejudice. Rivera argues, as he did below, that counsel should not have advised him to admit the two prior convictions, should have objected to the state’s request to amend its allegation to correct the county where the DUI conviction had occurred, and should not have informed the court the criminal damage offense had been designated a felony. Relying on Rule 17.6, Ariz. R. Crim. P., which requires a plea-type colloquy when a defendant admits a prior conviction, and *State v. Morales*, 215 Ariz. 59, 157 P.3d 479 (2007), Rivera suggests that, in light of counsel’s deficient advice, he did not knowingly, intelligently, or voluntarily waive his right to a prior convictions trial.

¶6 In *Morales*, however, defense counsel stipulated to prior convictions on behalf of his client in the absence of any Rule 17.6 colloquy. 215 Ariz. 59, ¶¶ 2, 10, 157 P.3d at 480, 481. Here, not only did Rivera himself meaningfully participate in the prior conviction hearing by entering his own admissions, but a full Rule 17.6-type colloquy took place. Notably, Rivera does not contend the colloquy did not occur or that any of the essential elements required by the rule were missing. Moreover, *Morales* did not involve a claim of

ineffective assistance of counsel like the one before us. Rather, the court there addressed the issue whether counsel's stipulation to the fact of a prior conviction required a Rule 17.6 colloquy and whether fundamental, prejudicial error had occurred in light of Morales's failure to object to the proceedings in the trial court. *Morales*, 215 Ariz. 59, ¶¶ 7, 10, 157 P.3d at 481. We find *Morales* inapposite to the matter before us.

¶7 Rivera contends that, but for his attorney's deficient performance, the state would have been unable to prove the prior convictions on the day of the hearing. He argues that, if he had not relied on counsel's misplaced advice, his sentences would not have exceeded three years, the maximum term he could have received absent proof of any prior convictions. Despite the state's agreement to cap his sentences at ten years, rather than the fifteen-year maximum he might otherwise have faced, Rivera nonetheless claims he did not receive the benefit of any bargain with the state.

¶8 Even assuming, arguendo, that counsel's performance was deficient and somehow prejudiced Rivera, he would be, at most, entitled to a new hearing at which the state would be put to its burden of proving Rivera's prior convictions, the very relief proposed in *Morales* and the same relief Rivera has expressly rejected. *Id.* ¶ 13. In dismissing the petition below, the trial court correctly noted:

However, this request for relief must be denied as [Rivera] has failed to demonstrate any prejudice. The petitioner is requesting, in essence . . . for the State to be bound to the facts that were presented at the trial/admission/stipulation in order to prove that there was, in fact, prejudice that inured to the detriment of the defendant. However, no trial was conducted and the remedy sought would require a "new trial" on the issue

of the prior convictions. The State would not be bound at that trial with the record presented at the prior's hearing at issue.

¶9 Because Rivera was not entitled to the only relief he sought, the trial court did not abuse its discretion in dismissing his claim. We also reject Rivera's claim that the court's comment at the beginning of the hearing that "[i]t doesn't sound as though there's any quid pro quo" somehow negates the court's subsequent acceptance of Rivera's admissions. The court made the statement before it understood the state had agreed to withdraw its allegation of three other prior convictions and the on-release allegation, a decision that provided a clear benefit to Rivera.

¶10 Because Rivera failed to establish a colorable claim for relief, we find no abuse of discretion in the court's dismissal of his claims without an evidentiary hearing. Although we grant the petition for review, we deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge